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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

No. 464.

BRINKERHOFF-FARIS TRUST AND SAVINGS COMPANY, Petitioner,

vs.

WALTER O. HILL, Treasurer and Ex-Officio Collector of Henry County, Missouri, Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

STATEMENT, BRIEF AND ARGUMENT OF THE RESPONDENT.

STATEMENT.

The plaintiff is a Missouri corporation engaged in the bank and trust company business at Clinton, Henry County, Missouri. The defendant is the Treasurer and Ex-Officio Collector of Revenue of Henry County, Missouri. The shares of stock in said corporation were assessable for taxation against the owners thereof on the 1st day of June, 1926, under Section 12775, R. S. Mo. 1919, and return thereof was made by the vice-president of said corporation to the Assessor of Clinton Township in said county, it

being under township organization, in which return the true net value of such shares of stock subject to taxation was given and stated by said corporation as $144,660.00. The township assessor accepted the valuation fixed by the corporation in its return and assessed said property for taxation at $144,660.00, which assessment valuation was approved by the County Board of Equalization of Henry County, Missouri, in the performance of its duty at its regular session in 1927 in equalizing the assessment of property subject to taxation in said county between the respective owners thereof. The Clerk of the County Court of Henry County, Missouri, duly certified the aggregate assessed valuation of the several classes of property in Henry County, Missouri, under the assessment of June 1, 1926, to the State Board of Equalization of Missouri, which in the performance of its duty at its regular session in 1927 in equalizing and adjusting the aggregate valuations of the several classes of property subject to taxation in the City of St. Louis and the several counties of the State between them, made no change in the assessed valuation of shares of stock in banks and trust companies in Henry County, Missouri. Accordingly, the valuation of the shares of stock in plaintiff bank and trust company was duly extended on the tax books at the amount fixed by it in its return and assessed by the township collector, to-wit, $144,660.00, against the owners of such shares of stock, and all taxes levied by lawful authority were duly extended against the same and certified to the township collector for collection. The plaintiff on the 30th day of December, 1927, tendered the township collector seventy-five per cent of said taxes, which was refused. Said taxes became delinquent on the 1st day of January, 1928, and it thereupon became and was the duty of the defendant to collect them, and he instituted suit therefor.

The plaintiff did not appeal to the County Board of Equalization of Henry County, Missouri, from the assess-

ment of said shares of stock by the assessor as it could have done under Section 12823, R. S. Mo. 1919, and as it was its duty to do if it complained of the valuation of such property as fixed by the township assessor.

The plaintiff, after the assessment rolls were made up, made no complaint to the State Tax Commission that such shares of stock were improperly assessed as it could have done under Section 12848, R. S. Mo. 1919, and as it was its duty to do if it complained of the assessed valuation of such shares of stock as fixed by the township assessor and approved by the county board of equalization.

The plaintiff made no complaint in regard to the assessment of said shares of stock until long after the assessment became final and the County Board of Equalization of Henry County, Missouri, and the State Board of Equalization of Missouri had acted thereon and finally adjourned; and such valuation was extended on the tax books of the county by the clerk of the county court and all taxes levied by lawful authority extended against the same and certified to the township collector for collection.

The plaintiff made no complaint that said shares of stock were not assessed for taxation at their true value in money. In fact, the plaintiff took no steps whatever to correct the assessment of its shares of stock or in regard thereto until it instituted this suit on the 26th day of April, 1928, after said taxes had become delinquent and the State of Missouri, Henry County, Missouri, and other political subdivisions of the State had entered into contracts based upon the revenue to be produced therefrom.

The plaintiff filed its amended petition in this cause in the Circuit Court of Henry County, Missouri, on the 23rd day of January, 1929, seeking to enjoin the defendant from collecting or attempting to collect any part of the taxes assessed and levied against said shares of stock based upon the valuation in excess of seventy-five per cent of the value thereof as stated in its return and fixed by the township

assessor and the several boards of equalization, charging that the township assessor had assessed all other real and personal property within Clinton Township in Henry County, Missouri, at seventy-five per cent of its true value in money, and had assessed all shares of stock in banks and trust companies in said county at the value thereof as stated in the returns made to the several assessors by the officers of such corporations, and that such valuation was the true value in money of such shares of stock on the first day of June, 1926; and that said township assessor had failed and omitted to assess poultry and suckling animals in said township and that the assessment of its shares of stock at their true value in money by the township assessor and the approval of such assessment by the county board of equalization and the approval of the aggregate of such assessments in Henry County, Missouri, by the State Board of Equalization, constituted a discrimination against the plaintiff and the shares of stock of plaintiff in violation of Sections 3 and 4 of Article X of the Constitution of Missouri, and in violation of Section 1 of Article XIV of the Constitution of the United States, and that the tax authorities had deliberately, intentionally, systematically and arbitrarily valued and assessed plaintiff's property at its true value in money, and deliberately, intentionally, systematically and arbitrarily undervalued and assessed all other property in Clinton Township, Henry County, Missouri, at seventy-five per cent of its true value in money, and had failed and omitted to assess poultry and sucking animals in said township.

The answer of defendant in substance denied that any discrimination had been made in the assessment of shares of stock in banks and trust companies or of shares of stock of plaintiff trust company, or that poultry and sucking animals were not assessed, or that all other real and personal property in Clinton Township, and in Henry County, Missouri, was assessed at only seventy-five per cent of its true value

in money, and alleged that the plaintiff failed to avail itself of adequate remedies provided by law, if such shares of stock were improperly assessed for taxation by the township assessor, and was not entitled to equitable relief, and also that the plaintiff had been guilty of such delay and laches in instituting the suit as to bar it from equitable relief.

The cause was tried before the Judge of the Circuit Court of Henry County, Missouri, on the 23 and 24 days of January, 1929, and judgment was rendered by said court on the 4th day of March, 1929, as follows:

> "Now on this 4th day of March, 1929, this cause coming on for final decision and judgment, the same having been taken under advisement by the court on January 24th, 1929, and the court now being fully advised in the premises finds the issue for the defendant.
>
> "It is therefore ordered, considered and adjudged by the court, that the prayer of the plaintiff for an injunction be, and the same is hereby denied, and the petition therefore dismissed.
>
> "It is further ordered and adjudged that the defendant have and recover of the plaintiff his costs herein laid out and expended, and have execution therefor."

The plaintiff, after unsuccessful motion for new trial, duly appealed to the Supreme Court of Missouri where the judgment of the trial court was affirmed. 19 S. W. (2nd) 746.

On the 6th day of January, 1930, the Supreme Court of the United States, on application of the plaintiff, granted a writ of certiorari against the Supreme Court of the State of Missouri in this cause.

SUMMARY OF ARGUMENT.

I.

We respectfully submit that the writ of certiorari was improvidently issued herein and should be quashed.

The trial court, under the pleadings and all of the evidence, found the issues for the defendant. The plaintiff alleged and the evidence showed conclusively that its shares of stock were assessed against the owners thereof for taxation in accordance with Section 12775, R. S. Mo. 1919.

THE PLAINTIFF DID NOT AND AS PETITIONER DOES NOT NOW CHALLENGE THE VALIDITY OF THAT STATUTE.

No attack whatever is made upon any statute of the State of Missouri concerning the assessment of shares of stock in banks and trust companies or the assessment of other real and personal property for taxation, as being contrary to or in violation of the Constitution, treaties or laws of the United States.

No claim whatever is made that such statutes permit or contemplate any discrimination against any taxpayer in the assessment of property, and it is apparent that all of such statutes contemplate the assessment of all property at its true value in money.

The evidence shows conclusively that the instruction of all assessing officers was that all property should be assessed for taxation at its true value in money. The township assessors testified that they did, according to their best judgment, assess all property in their respective townships at its true value in money. The members of the Board of Equalization of Henry County, Missouri, testified that they did, according to their best judgment, equalize the assessment of all property in the county between the owners thereof at its true value in money.

The township assessors testified that poultry and sucking animals were not assessed by them in their respective townships, and at the close of all the evidence plaintiff was permitted to amend its petition to allege the omission of such property. There was no evidence whatever that the State Board of Equalization approved such omission or had any knowledge of such fact. The plaintiff sought to substitute the opinion of various witnesses in regard to the value of several kinds of property in the county for the judgment of the assessor and of the county board of equalization, such evidence being admitted over the objections of the defendant. Respondent still insists such evidence is incompetent, but if deemed competent, it is insufficient to establish fraud.

It is fair to presume that the trial court found that plaintiff failed to prove the allegations of its petition; that it found that plaintiff had failed to avail itself of adequate remedies provided by law; that it found that plaintiff was guilty of such delay and laches as to bar it from equitable relief. If the holding was justified on either of the grounds, it should not be disturbed.

The Supreme Court of Missouri (petitioner's printed record, page 250) said:

> "The respondent and the Attorney-General, who filed a brief in the case as amicus curiae, insist that the appellant, on at least two grounds, is not entitled to equitable relief; (1) it did not make timely use of available legal remedies which were in every respect adequate and complete; and (2) it was guilty of laches."

The court resolved the issues against the plaintiff on both points.

The plaintiff had an adequate legal remedy by appeal from the valuation fixed by the township assessor to the

county board of equalization under Sections 12821, 12822 and 12823, R. S. Mo. 1919.

The plaintiff had an adequate legal remedy under Section 12848, R. S. Mo. 1919, by making complaint under oath to the State Tax Commission. (Opinion in this case petitioner's printed record, pp. 251-256.)

The plaintiff was guilty of such laches as to bar it from recovery (Opinion in this case, petitioner's printed record, pp. 256-257.)

The only ground petitioner can claim for the issuance of a writ of certiorari herein to review the judgment of the Supreme Court of Missouri, is the second clause of Section 344 of Title 28, U. S. C., which is as follows:

> "* * * or where is drawn in question the validity of a statute in any state, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, etc."

The issues raised do not involve the validity of any statute, they only involve the construction of the statutes. The statutes as construed violate no provision of the Constitution, treaties or laws of the United States.

When, as in this case, the decision of the state court is based on other than federal grounds, the writ of certiorari should not issue.

Harding v. Illinois, 196 U. S. 78.

WHEN, AS IN THIS CASE, THE DECISION OF THE STATE COURT IS BASED ON LACHES, THE PETITIONER IS NOT ENTITLED TO REVIEW.

Woods v. Chesborough, 228 U. S. 672.

The Supreme Court of the United States will not review on certiorari the decision of the Supreme Court of a state where that decision is based on the construction of the state's statutes unless it affirmatively appears that there has been drawn in question the validity of a statute of a state on the ground of it being repugnant to the Constitution, treaties or laws of the United States.

In order to give this court jurisdiction it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

California Powder Works v. Davis, 151 U. S. 389;
Missouri, Kansas & Texas Railroad Co. et al. v. Hanna L. Zuber, 256 U. S. 681;
Whitney v. California, 274 U. S. 357.

Where the judgment of a state court may rest upon either a federal or a non-federal ground, and the basis actually adopted does not appear by the court's opinion or otherwise, this court has no jurisdiction to review.

Cuyahoga River Power Co. v. Northern Realty Company et al., 244 U. S. 300.

II.

If it be held that the judgment of the Supreme Court of Missouri should be reviewed under the writ of certiorari, then we respectfully submit that the judgment should be affirmed.

THE DECISIVE QUESTION IN THIS CASE IS WHETHER PLAINTIFF IS ENTITLED TO ENJOIN THE COLLECTION OF TAXES LEVIED AGAINST ITS SHARES OF STOCK AT THEIR TRUE VALUE

IN THE MANNER PROVIDED BY LAW BECAUSE POULTRY AND SUCKING ANIMALS MAY HAVE BEEN OMITTED BY THE TOWNSHIP ASSESSORS OF HENRY COUNTY, MISSOURI, IN MAKING THEIR ASSESSMENT OF PROPERTY IN THEIR RESPECTIVE TOWNSHIPS.

If the above question be answered in the affirmative, then all taxpayers in Henry County, Missouri, should be entitled to enjoin the collection of taxes levied against their property. The above question raises the further subordinate question: Is the plaintiff entitled to decide what proportion of the taxes levied against its shares of stock it will pay, or, in other words, are taxes a gift from the taxpayer to the sovereignty, or are they an exaction levied from the owners thereof for the privilege of owning the same and having it protected and preserved by the government for whose support such taxes are levied?

There is absolutely no evidence upon which a finding could be had that all other property, except shares of stock in banks, was assessed at seventy-five per cent of its value.

If the plaintiff be entitled to enjoin the collection of all or any part of the taxes levied against its shares of stock because perchance poultry and sucking animals may not have been assessed for taxation, then all taxpayers are entitled to the same relief and, if any property within the jurisdiction in which they live be illegally omitted from taxation by inadvertence or by intention of the assessor, they are entitled to refuse to pay taxes and to go into a court of equity and enjoin the collector from collecting or attempting to collect taxes levied against their property.

The Constitution and laws of Missouri contemplate that all real and personal property subject to taxation in the State, shall be assessed at its true value in money; that it shall be assessed and taxed in proportion to its value, and that such taxes shall be uniform on the same class of sub-

jects for taxation within the territory of the authority levying the tax.

Sections 3 and 4, Article X, Constitution of Missouri;
Sections 12802, 12855, 12775, 12821, 12822, 12826, R. S. Mo. 1919;
State ex rel. v. Western Union Telegraph Company, 165 Mo. 502;
State ex rel. v. Bethards, 9 S. W. (2d) 603;
State ex rel. v. Dirckx, 11 S. W. (2d) 38;
Mercantile Trust Company v. Schramm, 269 Mo. 489.

Sections 3 and 4 of Article X of the Constitution of Missouri, are as follows:

> "Sec. 3. Taxes may be levied and collected for public purposes only. They shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and all taxes shall be levied and collected by general laws.
>
> "Sec. 4. All property subject to taxation shall be taxed in proportion to its value."

The meaning of Section 4, supra, can not be made clearer than the language used.

It has always been the law in Missouri under Section 3 of Article X of the Constitution, supra, that the validity of a tax "is in no wise impaired or affected because a different mode of assessment is provided for, so long as the same end is attained" and uniformity of assessment and taxation be maintained.

State ex rel. v. Severance et al., 55 Mo. 378, l. c. 387;
State ex rel. Johnson v. Bank, 279 Mo. 228.

In the case at bar, the evidence conclusively shows that all shares of stock in banks and trust companies in Henry County and throughout the State of Missouri,

were assessed on the same basis at their true value in money. The evidence of the township assessors and members of the County Board of Equalization of Henry County, Missouri, was that all real and personal property assessed for taxation in Henry County, Missouri, was assessed at its true value in money.

Section 12756, R. S. Mo. 1919, is as follows:

> "Every person owning or holding property on the first day of June, including all such property purchased on that day, shall be liable for taxes thereon for the ensuing year."

Section 12766, page 376, Laws of Missouri, 1923, which was in effect at the time of the assessment in this case, is as follows:

> "The assessor or his deputy or deputies shall, between the first days of June and January, and after being furnished with the necessary books and blanks by the county clerk at the expense of the county, proceed to take a list of the taxable personal property in his county, town or district, and assess the value thereof, in the manner following, to-wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such person to make a correct statement of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise which may be required to pay a license tax, being in any county in this state, in accordance with the provisions of this chapter; and the person listing the property shall enter a true and correct statement of such property in a printed or written blank prepared for that purpose; which statement after being filled out, shall be signed and sworn to, to the extent required by this

chapter by the person listing the property, and delivered to the assessor. Such lists shall contain: First, a list of all the real estate and its value, to be listed and assessed on the first day of June, 1893, and every year thereafter, anything in this or any other section to the contrary; second, a list of all the live stock, showing the number of horses, mares, and geldings, and their value; the number of asses and and jennets, and their value, the number of mules and their value; the number of neat cattle, and their value; the number of sheep and their value; the number of hogs and their value and all other live stock and its value; third, an aggregate statement of all the farm machinery and implements, and their value; fourth, a statement of household property, including the number of pianos and other musical instruments, clocks, watches, chains and appendages, sewing machines, gold and silver plate, jewelry, household and kitchen furniture, and the value thereof; fifth, money on hand; sixth, money deposited in any bank, or other safe place; seventh, an aggregate statement of solvent notes unsecured by mortgage or deed of trust; eighth, an aggregate statement of all solvent notes secured by mortgage or deed of trust; ninth, an aggregate statement of all solvent bonds, whether state, county, town, city, township, incorporated or unincorporated companies; tenth, the number of bee colonies and their value; ten and one-half, all motor vehicles, and their value; eleventh, all other property not above enumerated (except merchandise) and its value; under this head shall be included all pleasure carriages of all kinds; all shares of stock or interest held in steamboats, keelboats, wharf boats and other vessels; all toll bridges, all printing presses, type and machinery therewith connected, and all portable mills of every

description, and all post coaches, carriages, wagons and other vehicles used by any person in the transportation of mail (except railway carriages), all carriages, hacks, wagons, buggies and other vehicles of every kind and description kept or used by liverymen, all carts, hacks, omnibuses, and other vehicles used in the transportation of persons (except railway carriages), and all paintings and statuary, and every other species of property not exempt by law from taxation."

The applicable part of Section 12802, R. S. Mo. 1919, is as follows:

"The assessor shall value and assess all the property on the assessor's books according to its true value in money at the time of the assessment; and all other personal property shall be valued at the cash price of such property at the time and place of listing the same for taxation."

The applicable part of Section 12775, R. S. Mo. 1919, concerning the assessment of shares of stock in banks, is as follows:

"Persons owning shares of stock in banks, or in joint stock institutions or associations doing a banking business, shall not be required to deliver to the assessor a list thereof, but the president or other chief officer of such corporation, institution or association shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the face value thereof, the value of all real estate, if any, represented by such shares of stock, together with all reserved funds, undivided profits, premiums or earnings and all other values belonging to such corporation, company, institution or association; and

such shares, reserved funds, undivided profits, premiums or earnings and all other values so listed to the assessor shall be valued and assessed as other property at their true value in money, less the value of real estate, if any, represented by such shares of stock."

"The law contemplates that for the purposes of taxation property shall be assessed at its true value in money, * * * and it also presumes that all officers do their duty."

State ex rel. v. Western Union Telegraph Company, 165 Mo. 502, l. c. 516.

III.

Section 12775, R. S. Mo. 1919, supra, provides how the value of shares of stock in banks and trust companies shall be determined for assessment for taxation. In other words, it provides a method for determining the true value in money of such shares of stock.

The plaintiff made return by its proper officers to the township assessor under the above statute and valued such shares of stock subject to taxation and assessment against the owners thereof, after deducting the value of real estate represented by such stock, at $144,660.00. The valuation so fixed by the plaintiff was adopted by the assessor in making his assessment. No appeal therefrom was taken to the county board of equalization by the plaintiff, nor was any complaint made in regard thereto by the plaintiff to the State Tax Commission. The valuation fixed by the plaintiff in its return was not changed by anyone and the taxes, the collection of which is sought to be enjoined, were levied and extended against such valuation as being the true value of such shares of stock.

The shares of stock in plaintiff bank having been assessed for taxation at their true value in money and in

the manner provided by law, the plaintiff is in no position to complain. Plaintiff's petition and the admitted facts in the case show that the shares of stock in plaintiff trust company were assessed as provided by law, and that plaintiff is not entitled to relief by injunction.

Section 12775, R. S. Mo. 1919;
State ex rel. Johnson v. Bank, 279 Mo. 228;
State ex rel. Gardner v. Harris, 286 Mo. 262;
St. Louis Electric Bridge Company v. Koeln, 315 Mo. 424;
Bay v. Citizens State Bank, 274 Mo. 60;
State ex rel. Bybee v. Hackmann, 276 Mo. 110;
State ex rel. Meals v. Hackmann, 217 S. W. 271;
State ex rel. McCune v. Carter, 279 Mo. 304.

IV.

The State Board of Equalization of Missouri is created and its duties prescribed by the Constitution and laws of the State. Section 18, Article X, Constitution of Missouri, is as follows:

> "There shall be a State Board of Equalization, consisting of the Governor, State Auditor, State Treasurer, Secretary of State and Attorney-General. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the State, and it shall perform such other duties as are or may be prescribed by law."

Section 12855, R. S. Mo. 1919, is as follows:

> "The state auditor shall lay before the board of equalization the abstracts of all the taxable property in the state and the abstracts of the sales of real estate in such counties as returned to him by the respective county clerks and the president of the board of assessors of the city of St. Louis, and the

board shall classify all real estate situate in cities, towns and villages as town lots and all other real estate as farming lands, and shall classify all personal property as follows: First, banking corporations; second, railroad corporations; third, street railway corporations; fourth, all other corporations; fifth, bonds, notes and evidences of indebtedness; sixth, horses, mares and geldings; seventh, mules; eighth, asses and jennets; ninth, neat cattle; tenth, sheep; eleventh, swine; twelfth, farm implements and all other personal property. And the board shall proceed to equalize the valuation of each class thereof among the respective counties of the state in the following manner:

"First—It shall add to the valuation of each class of the property, real or personal, of each county which it believes to be valued below its real value in money such per centum as will increase the same in each case to its true value.

"Second—It shall deduct from the valuation of each class of the property, real or personal, of each county which it believes to be valued above its real value in money such per centum as will reduce the same in each case to its true value."

The judgment of the State Board of Equalization is final and conclusive on the question of the aggregate valuation to be placed on classes of property in the City of St. Louis and the counties of the State in equalizing the same among the counties.

Section 18, Article X, Constitution of Missouri;
Section 12855, R. S. Mo. 1919;
Sections 12821 and 12826, R. S. Mo. 1919;
State ex rel. Laclede Land & Improvement Co. v. Tax Commission, 295 Mo. 298, 243 S. W. 887;
State ex rel. v. Bethards, 9 S. W. (2d) 603;

State ex rel. v. Dirckx, 11 S. W. (2d) 38;
State ex rel. Johnson v. Bank, 279 Mo. 228;
Mercantile Trust Company v. Schramm, 269 Mo. 489;
State ex rel. v. Hall, 221 S. W. 708;
State ex rel. Gardner v. Harris, 286 Mo. 262;
State ex rel. Hawken v. Edwards, 315 Mo. 209;
State ex rel. Teare v. Dungan, 265 Mo. 353;
State ex rel. Wyatt v. Hoyt, 123 Mo. 348.

V.

The laws of Missouri provide that the assessors shall assess all property subject to taxation in their respective jurisdictions at its true value in money; Sections 12802 and 12775, R. S. Mo. 1919, and Section 12766, page 376, Laws of Missouri, 1923; that the assessed valuation as fixed by the assessor shall be examined, adjusted and equalized at its true value in money between the owners of such property by the county board of equalization of the county in which it is located, Sections 12820, 12821 and 12822, R. S. Mo. 1919; that the abstracts of the aggregate assessment of each of the classes or kinds of property located in a county as assessed for taxation by the assessors and equalized by the county boards of equalization, shall be certified to the State Board of Equalization, Section 12810, R. S. Mo. 1919, and that the State Board of Equalization shall equalize such aggregate assessment of the several kinds or classes of property between the City of St. Louis and other counties of the State so that the assessment of such property for taxation in each of them shall be at the true value of such property. Section 18, Article X, Constitution of Missouri; Section 12855, R. S. Mo. 1919.

VI.

It appears from the face of plaintiff's petition that it did not bring this action until long after the State, county

and other political subdivisions of the State had made their tax levies and entered into contracts and assumed obligations based on the assessed valuation as fixed by the assessing authorities, and by reason of such delay and laches the plaintiff is barred from equitable relief.

Lyons v. School District of Joplin, 278 S. W. 74;
Brinkerhoff-Faris Trust and Savings Company v. Hill, 19 S. W. (2d) 746, Par. 9, l. c. 751, 752;
Petitioner's printed record herein, pp. 256 and 257.

VII.

The plaintiff failed to avail itself of the remedies provided by law, took no appeal to the county board of equalization, and made no complaint to the State Tax Commission. Equitable relief will not be granted where the plaintiff had complete and adequate remedies at law of which it failed to avail itself.

34 C. J. par. 685, p. 436;
Black v. McGonigle, 103 Mo. 192;
National Bank of Unionville v. Staats, 155 Mo. 55;
Meyer v. Rosenblatt, 78 Mo. 495;
State ex rel. v. Bank of Neosho, 120 Mo. 161;
State ex rel. Johnson v. Bank, 279 Mo. 228;
State ex rel. Gardner v. Harris, 286 Mo. 262;
State ex rel. Mount Mora Cemetery Association v. Casey, 210 Mo. 235;
State ex rel. Johnston v. Buder, 242 S. W. 979;
Perkins v. St. Louis, Kansas City and Colorado Railroad Company, 143 Mo. 513;
Chicago & Alton Railroad Company v. Maddox, 92 Mo. 469;
State to use of Connelly v. Parkville G. R. R. Co., 32 Mo. 496;
San Francisco Railway Company v. Gracy, 126 Mo. 472;

Hamilton v. Rosenblatt, 8 Mo. Ap. 237;
State ex rel. Cramer v. Hager, 92 Mo. 511;
Deane v. Todd, 22 Mo. 90;
First National Bank v. Meredith, 44 Mo. 500;
McPike v. Pew, 48 Mo. 525.

VIII.

The petitioner complains that it was discriminated against and denied the equal protection of the law because the Supreme Court of Missouri in the instant case did not follow its former ruling in the case of State ex rel. Laclede Land & Improvement Company v. State Tax Commission, 295 Mo. 298, 243 S. W. 887, as to the powers of said commission.

There is no merit in this complaint.

Where the courts of the state have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same courts have held that the statute was theretofore misconstrued, and really provided a different mode of procedure, this last adjudication cannot be set aside in the federal court on the ground of unjust discrimination or a denial of equal protection of the law.

Backus et al. v. Fort Street Union Depot Co.,
169 U. S. 557 l. c. 571; 42 Law Ed. 853 l. c. 859;
Howard v. Kentucky, 200 U. S. 164;
50 Law Ed. 421.

IX.

The action of the township assessor in assessing property, the county board of equalization in equalizing the valuation of property between individuals, and of the State Board of Equalization in equalizing and fixing the valuation of the classes of property in the various counties of the State is judicial and their decisions have the effect of judgments.

State ex rel. Johnston v. Buder, 242 S. W. 979;
State ex rel. v. Casey, 210 Mo. 235;
State ex rel. Ashby v. Three States Lumber Co., 198 Mo. 430;
State ex rel. Arnold v. McCune, 252 S. W. 657;

Injunction cannot be used to review a judgment.

Dorris Motor Car Company v. Colburn, 307 Mo. 137.

X.

Courts of equity will not interfere with the assessment of property for taxation or enjoin the collection of taxes merely because of mistakes of assessing officers or the fallibility of human judgment. Such relief must be based upon intentional and systematic discrimination amounting to fraud or intentional and systematic discrimination in the statutes themselves, or in the method of applying the statutes such as to make them violative of the constitutional guaranties as to equal protection of the law.

"The occasional and accidental discriminations are inevitable in every assessment, and are not likely to continue, because not the result of an illegal purpose on the part of any one. If equitable interference in such cases could be invoked, the obstruction to the collection of taxes would be so frequent as to be intolerable. More than this, an action to enjoin a tax is a collateral attack upon the judgment of a quasi judicial tribunal; and it cannot be justified except on the ground of an obvious violation of law, or something equivalent to fraud. It does not lie where the injury complained of arises only from the erroneous, but honest, judgment of the lawfully constituted tax tribunal."

Taylor et al. v. Louisville & N. R. Co., 88 Fed. 350, l. c. 373 and 374.

ARGUMENT.

We respectfully submit that under the pleadings and evidence in this case the only ground for complaint of discrimination in the assessment of property is that poultry and sucking animals were not assessed in Henry County, Missouri. Plaintiff claims that this was a fraud against it and in violation of its rights under Sections 3 and 4 of the Constitution of Missouri, and Section 1 of the XIV amendment to the Constitution of the United States, and that it deprived the plaintiff's shareholders of equal protection of the law.

We respectfully submit that if the property of a taxpayer be omitted from assessment, it is not a fraud on the taxpayer whose property is correctly assessed, but instead is a fraud on the government.

Plaintiff vehemently complains that poultry and sucking animals were not assessed in Clinton Township. Whether they were assessed or not is not material in this case. *Plaintiff's property was assessed at its true value in money in the manner provided by law.* The plaintiff suffered no damage or loss if poultry and sucking animals were omitted, and the loss, if any, fell wholly on the taxing bodies. The value of poultry products in the aggregate may be great, but most of it is the result of daily or at least of seasonable production, and courts may be assumed to know what everyone knows. The amount of poultry on hand on the first day of June of any year would be negligible. It may be that pigs, calves, lambs, colts, and other animals not yet separated from their mothers and which could not exist without them, should be taxed, but the General Assembly of Missouri in making the classifications of property and providing for the form of the list to be made (Section 12766, page 376, Laws of Missouri, 1923) did not see fit to make a separate classifica-

tion for such animals, and there is no reason for believing or assuming that they are not, when of any taxable value, included in the list of animals of all ages assessed. It is at most a captious claim and belongs to the same category as one would that wheat, hay, corn and oats, as such, are not listed separately for taxation. Such things represent potential wealth and are eventually converted into money, and the wealth produced is taxed in that form. If the producer has the money on the first day of June of any year, it is assessed. If he has paid his debts with it, it should be assessed in the hands of the ultimate beneficiary. If he has bought property, it is assessed. The law contemplates that all property subject to taxation shall be assessed against the owners thereof on the first day of June of each year. Section 12756, R. S. Mo. 1919.

The General Assembly of Missouri has not thought it fit or proper to make a special classification of poultry, but the eleventh subdivision of Section 12766, page 376, Laws of Missouri, 1923, provides for the assessment of "all other property not above enumerated." It may be that the plaintiff should be relieved from taxation on its shares of stock because the chickens of the thrifty housewife were omitted from taxation. Perhaps instead of assessing plaintiff's property at its true value, the assessor should have been busy counting how many hens and roosters or turkey hens or gobblers or ducks, geese and guineas the farmer's wife was tending to help raise enough money to support the family and pay the interest on their indebtedness.

Section 12967, R. S. Mo. 1919, provides in part:

> "The term 'property,' wherever used in this chapter, shall be held to mean and include every tangible or intangible thing being the subject of ownership, whether animate or inanimate, real or personal."

Undoubtedly, chickens, turkeys, geese, ducks, colts, calves, lambs and pigs are property; so are shirts, collars, socks and shoes, but the General Assembly of Missouri saw no good reason for requiring each article to be separately listed and shown on the assessment lists or books. It has not required that a detailed inventory be made, and in its judgment undoubtedly believed and intended that the classifications made in Section 12766, supra, were broad enough to include every species of property not expressly provided to be assessed in other manners by other laws. Shares of stock in banks are expressly provided to be assessed in another manner under Section 12775, R. S. Mo. 1919.

We have studied the complaint of the plaintiff in regard to the failure of the township assessor to assess chickens and sucking animals for taxation. Most of its complaint is relative to chickens because of the aggregate amount of wealth annually produced from that source, but ducks, geese, turkeys, colts, calves, lambs and pigs are entitled to their share. We are tempted to say that most of the income realized from poultry and poultry products is the result of the daily labor and care of the thrifty women who, between times of taking care of their own babies, ministering to the comforts of their families, tending the gardens and preserving a supply of fruit for the winter season, look after a few hens, a rooster or two, a turkey gobbler and hen, and perhaps an incubator and possibly some ducks and geese. They have gathered the eggs daily and cared for the flocks hourly to provide their families with groceries, clothe themselves and their children, and if there be any surplus left, help the heads of the families pay their interest. In Henry County, Missouri, as in all other counties of the State, the low rumble of the thunder and the vivid flash of the lightning in the nighttime is sufficient to arouse the guardian of the flocks to see that they are safely sheltered from the threatened torrents. It has been said that they have no need of a Standard Dictionary in

pursuing their labors because two words express their problem: "If" and "maybe." "If" the hatch is good, "maybe" they can raise a flock. No doubt as a matter of law, the hens on hand June 1st of each year should be assessed at their true value in money. No doubt the roosters should also be assessed, although, according to the United States government reports, at that time of the year they are a liability instead of an asset. In the determination of the assessment of such property, the law makes no provision for "deductible liability." The baby chicks might be listed as a "hope" and included in the assessment if the assessors are able to determine their actual value. The same conditions exist as to turkeys, geese, guineas and ducks. Perhaps the old gobbler should be assessed when he is strutting and according to his pomp and own estimate of his worth. The turkey hens and little turkeys are also property, and no provision is made by law in such cases for "reserves against losses." The lordly gander as he proudly leads the geese and goslings up and down the fence looking for a hole large enough to crawl through into the garden where tender plants may be had for the pulling, together with his followers, should not as a matter of law be omitted. Peafowls are also property, likewise canaries, and should not be overlooked.

If young animals were omitted from assessment, they were when separated from their mothers, practically valueless. There is no evidence of the value of poultry in Henry County, Missouri, on June 1, 1926. The only evidence was as to the opinions of certain witnesses as to the value of the annual poultry production.

No set amount can be fixed for the valuation of property by the assessor because its value must depend upon the facts in each particular case and be measured by the conditions which exist on the first day of June, which is the day fixed by law for the determination of such value and the assessment of such property. The assessors are entrusted with

the duty of assessing all property subject to taxation at its true value in money. They must of necessity exercise their judgment in determining that value and endeavor to honestly and impartially assess all kinds of taxable property on the same basis. The evidence in this case shows conclusively that the assessors honestly and fairly endeavored so to do.

Where poultry raising is engaged in as a business, the property is assessed for taxation. Where the raising of poultry is merely incidental, it may have been omitted. When the ideal condition arises and all property except such as is expressly exempted from taxation by the Constitution, is taxed according to its true value in money, the rates of taxation levied by the State and all of its political subdivisions can be greatly reduced and the burden of government be equally borne by all, but the amount of taxable wealth represented by poultry and sucking animals which escapes taxation, is but a drop in the bucket as compared to the great amount of wealth represented by other forms of property which the assessing officers are unable to discover. These observations are made because there is no need of allowing a "herring to be dragged across the trail" in the search for taxable wealth.

The plaintiff, petitioner herein, has no just cause of complaint as to the assessment of its shares of stock for taxation. The value of such shares of stock was determined in the manner provided by Section 12775, R. S. Mo. 1919, from which was deducted the value of all real estate represented by shares of stock because such real estate was taxable as "lands and town lots." Instead of the owners of shares of stock in banks and trust companies being discriminated against in the assessment of such property, they are of the most favored class known to the law. All of the indebtedness of the bank is deducted in determining the total valuation and only the net value is assessed for taxation. All other corporations are taxable on all of their

property regardless of the amount of their indebtedness, and can not deduct such indebtedness in making their return for assessment for taxation. No farmer or home owner or any other citizen can deduct their indebtedness from the amount of property owned by them in making their return for assessment for taxation, but all property owned by them must be assessed at its true value in money. All persons or corporations, except banks and trust companies, under the law are assessed for taxation on the true value of all of their property regardless of the amount they owe, even if such indebtedness be for the purchase price of the property subject to taxation.

We respectfully submit that the true rule in regard to the effect of the omission of poultry and sucking animals from taxation should be: IF ANY PROPERTY BE ILLEGALLY OMITTED FROM ASSESSMENT, OR BE ASSESSED BELOW ITS TRUE VALUE, EVEN IF INTENTIONAL ON THE PART OF THE ASSESSOR, IT DOES NOT CONSTITUTE A FRAUD ON THE OWNERS OF PROPERTY WHICH IS ASSESSED AT ITS TRUE VALUE, BUT DOES CONSTITUTE A FRAUD ON THE STATE AND ON THE POLITICAL SUBDIVISIONS OF THE STATE WHICH ARE AUTHORIZED TO LEVY AND COLLECT TAXES.

CONCLUSION.

The respondent respectfully insists that the plaintiff (petitioner herein) is not entitled to enjoin the collection of the taxes or any part thereof levied against the owners of its shares of stock, or to have the judgment of the Supreme Court of Missouri reviewed by this court because:

First: The validity of no statute of the State of Missouri is drawn in question as being violative of the Constitution, treaties or laws of the United States.

Second, the acts of no officer purporting to be in accordance with the laws of Missouri is drawn in question as being an interpretation or application of the laws of the State in a way to be violative of the Constitution, treaties or laws of the United States.

If poultry and sucking animals were not assessed by the township assessors of Henry County, Missouri, such omission was in violation of the laws, and proper legal remedies are provided by law for having such omitted property assessed. Such omission would not constitute an intentional, systematic and arbitrary discrimination against the plaintiff such as to entitle it to enjoin taxes lawfully levied against its shares of stock at the true value thereof as determined in the manner provided by law. If such omission constituted fraud, it was fraud against the State and its political subdivisions and not a fraud against taxpayers whose property was properly assessed.

Third: The plaintiff (petitioner herein) failed to avail itself of complete and adequate remedies provided by law if its shares of stock were illegally or improperly assessed, and for that reason is not entitled to equitable relief.

Fourth: The plaintiff (petitioner herein) was guilty of such laches in not seeking relief until after the assessment became final and the valuations were extended upon the tax books and the taxes were computed and extended thereon and certified to the collector for collection, and until after the State, the county and other political subdivisions of the State had entered into contracts based upon the amount of revenue to be derived therefrom, that it is barred from equitable relief.

The judgment of the trial court and of the Supreme Court of the State of Missouri was for the right party and should be upheld.

Respectfully submitted,

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